Supreme Court, U.S.
FILED

001512 JAN 23 2001

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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

WON HO SONG,

Petitioner,

versus

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether petitioner's guilty plea is knowing and intelligent when he was not aware of the tolling allegation contained in the complaint and thereby did not know that the State had to prove that the statute of limitation was tolled.

2. Whether petitioner's guilty plea is knowing and intelligent when he was not aware of a potentially meritorious defense.

3. Whether petitioner received ineffective assistance of counsel because his counsel failed to inform him of a potentially meritorious defense.

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OPINION BELOW

On July 13, 2000, the California Court of Appeals filed an unpublished memorandum opinion, affirming the trial court's judgment. The Court of Appeals memorandum opinion is reproduced in Appendix A to this Petition. On October 25, 2000, the California Supreme Court denied petition for review. A copy of that denial is attached as Appendix B.

JURISDICTION

The California Supreme Court denied petition for review on October 25, 2000, and thus the last day to file a petition for a writ of certiorari is January 23, 2001. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257.

STATEMENT OF THE CASE

1. Background

On July 2, 1998, petitioner was charged in a six-count complaint, along with his wife, Eun Ja Song, with one count of arson of a structure (Pen. Code sections 451(c)), two counts of insurance fraud (Pen. Code section 550(a)), and three counts of grand theft (section 487(a)). On the day of preliminary hearing and prior to the preliminary hearing, petitioner entered pleas of no contest to one count of insurance fraud and one count of grand theft.

Prior to sentencing, petitioner moved to withdraw his plea on the grounds that his plea was not knowing and intelligent because he was not aware of the tolling allegation in the complaint and because he was not informed of a potentially meritorious defense, he received ineffective assistance of counsel because his counsel failed conduct proper investigation and inform him of a potentially meritorious defense, the prosecutor breached the plea agreement, and there was no factual basis for the plea. The trial court denied petitioner's motions to withdraw his plea. On July 9, 1999, the trial court sentenced petitioner to two years in state prison and recommended that petitioner serve his sentence at a restitution center.

2. Facts Surrounding Petitioner's Guilty Plea

The charge of grand theft to which petitioner pled arose from a loan which petitioner received from the Small Business Administration in 1993 by submitting a falsified income tax return. The complaint charging petitioner of grand theft was filed in 1998. The statute of limitations for the offense of grand theft is three years from the time the victim had actual notice of circumstances sufficient to make them suspicious of fraud thereby leading them to make inquiries which might have revealed the fraud. The complaint contained a tolling allegation, stating that the victim could not have discovered the theft until on or about and after April 1998.

However, within the discovery received by the defense counsel from the prosecutor, there was a telephone log of the Small Business Administration loan officer who concluded in 1993 that petitioner had submitted a falsified income tax return. Based on such conclusion, the SBA granted only a partial loan to petitioner but did not pursue any criminal action against petitioner. The SBA's knowledge of the falsified return would have barred the government from charging petitioner with grand theft in 1998. Regretfully, the trial counsel had not reviewed the evidence close enough to know that the victim had actual notice of the circumstances surrounding the falsified return and did not realize that it would have triggered the running of the statute of limitations in 1993. Consequently, the trial counsel did not discuss the issue of statute of limitations, let alone inform petitioner of the tolling allegation in the complaint.

Although the complaint included the tolling allegation, petitioner was not aware of the tolling allegation at the time he pled to the offense. In support of his motion to withdraw his pleas, petitioner submitted to the trial court a declaration (Appendix C) stating that he was not aware of the statute of limitations issue and that he would not have pled had he known that he had a statute of limitations defense. Petitioner's trial counsel who represented him at the change of plea hearing also submitted a declaration (Appendix D) stating that he did not discuss the statute of limitations defense with petitioner.

REASONS FOR GRANTING THE WRIT

I.

PETITIONER'S GUILTY PLEA CANNOT BE KNOWING AND INTELLIGENT BECAUSE HE WAS NOT AWARE OF THE TOLLING ALLEGATION AT THE TIME HE PLED

It is well established that a guilty plea is not "intelligent" unless the defendant first receives "real notice of the true nature of the charge against him," and the defendant, his attorney, and the court correctly understood the essential elements of the crime. Bousley v. United States, 523 U.S. 614, 618 (1998). In understanding the elements of the crime, a defendant must also understand how those elements relate to the facts. Henderson v. Morgan, 426 U.S. 637, 645 (1976).

At the withdrawal of his plea hearing, petitioner repeatedly stated to the trial court that he was not informed of the tolling allegation by anyone, including his attorney, and thus was not aware that the government had the burden to prove that the statute of limitations was tolled before proceeding with the prosecution of the grand theft charge. The evidence clearly showed that although the SBA knew of the falsified income tax return, the SBA did not investigate further and did not pursue a criminal prosecution in 1993.[1]

When the government makes the statute of limitations an issue by alleging tolling in the

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[1] The loan was fully secured by petitioner's building.

complaint, a defendant should be made aware of the tolling allegation before entering his plea. This is especially true since the tolling allegation is included in the complaint to inform petitioner the government's burden to prove timely filing of the charge. Because petitioner was not aware of what the government had to prove regarding the grand theft charge against him, his plea was not intelligent.

Moreover, if petitioner's plea is allowed to stand, it would mean that a defendant can waive the statute of limitations or the tolling issue without even knowing that there is an issue. Such plea cannot be an intelligent plea.

II.

PETITIONER'S GUILTY PLEA IS NOT KNOWING AND INTELLIGENT BECAUSE HE WAS NOT AWARE OF A POTENTIALLY MERITORIOUS DEFENSE

Petitioner's counsel never discussed the statute of limitations defense with petitioner prior to the change of plea. Petitioner did not even know that there was a statute of limitations issue or a defense based on the statute of limitations. Although this claim was raised in the trial court and the court of appeals, neither court addressed the issue. It was never disputed that petitioner's counsel failed to discover the evidence which pointed to the victim's knowledge of the fraud. The counsel's failure to discover the evidence led him to overlook the statute of limitations defense and failed to inform petitioner of a potentially meritorious defense. Because Petitioner entered his plea without having been informed of a

potentially meritorious defense, and thus without an accurate evaluation of his case, his plea cannot be knowing and intelligent.

III.

PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS COUNSEL FAILED TO INFORM HIM OF A POTENTIALLY MERITORIOUS DEFENSE AND TO INFORM HIM OF THE TOLLING ALLEGATION

The trial counsel submitted a declaration to the trial court, stating that he did not inform petitioner that the grand theft charge to which he pled may be barred by the statute of limitations. More importantly, the trial counsel stated that he did not know there was evidence to show that the victim knew of the falsified income tax return in 1993 to negate the tolling allegation. This is not a case where the trial counsel failed to investigate a defense. The evidence which would have established that the statute of limitations defense was available was included in the discovery given to the defense by the prosecution. The trial counsel simply overlooked the whole statute of limitations defense and failed to locate the evidence to support it and discuss the defense with petitioner.

Clearly, the trial counsel failed from his obligation to inform petitioner of a potentially meritorious and crucial defense, and thus, he failed to provide petitioner with an accurate evaluation of the case. Petitioner repeatedly stated to the trial court that he would not have pled guilty had he known about the statute of

limitations defense. Since petitioner was denied effective assistance of counsel at the time he pled guilty, he should be allowed to withdraw his pleas and given an opportunity to proceed with a trial.

CONCLUSION

For the foregoing reasons petitioner respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

THE PEOPLE,	**B133847**
Plaintiff and Respondent,	**(Super.Ct. No. BA170708)**
v.	
WON HO SONG,	
Defendant and Appellant.	

COURT OF APPEAL - SECOND DIST.
FILED

JUL 13 2000
JOSEPH A. LANE Clerk
Z. HERALDEZ
Deputy Clerk

Appeal from a judgment of the Superior Court of Los Angeles County.

Sung Bae Park, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General of the State of California, David P. Druliner, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, Lance E. Winters, Supervising Deputy Attorney General, and Analee J. Nations, Deputy Attorney General, for Plaintiff and Respondent.

Appellant Won Ho Song pled no contest to one count of insurance fraud in violation of Penal Code section 550, subdivision (a)[2] and one count of grand theft in violation of section 487, subdivision (a). The trial court sentenced appellant to two years in state prison, with the recommendation that he be placed in a restitution center. The court ordered appellant to pay $521,375 in restitution to Cigna Insurance and $281,800 in restitution to the Small Business Administration.

Appellant obtained a certificate of probable cause from the trial court, and appeals from the judgment of conviction. He contends that his no contest plea was not knowing and intelligent, not voluntary, lacks a supporting factual basis, and was the result of ineffective assistance of counsel. Appellant further contends that the trial court erred in ordering appellant to pay restitution to Cigna Insurance. Respondent contends that the trial court erred in failing to order state and

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[2] All further statutory references are to the Penal Code unless otherwise specified.

county penalty assessments for the restitution fines. We affirm the judgment of conviction.

Facts

Appellant was charged with one count of arson in violation of section 451, subdivision (c), two counts of insurance fraud in violation of section 550, subdivisions (a)(1) & (5), two counts of grand theft in violation of section 487, subdivision (a) and one count of grand theft in violation of section 487(1).

The section 487(1) grand theft charge alleged that appellant submitted false income tax returns to the Small Business Administration ("SBA") in 1993 to secure a loan to rebuild a business destroyed by fire during the 1992 civil disturbance, and that the loan proceeds were not used for their agreed-upon purpose. That count contained an allegation pursuant to *People* v. *Zamora* (1976) 18 Cal.3d 538 that the fraud was not discovered or reasonably discoverable within the meaning of section 803, subdivision (c)(1) and (3), until April 1998.

The remaining five counts arose from the destruction, by incendiary fire, of appellant's building in the 4200 block of Crenshaw Boulevard. That fire occurred in July 1995. The insurance fraud and section 487, subdivision (a), grand theft charges arose from insurance claims submitted following the fire. Appellant's wife, Eun Ja Song, was a co-defendant on all six counts. Mrs. Song, although a legal resident of the United States, was

not a citizen, and faced deportation if convicted in this matter.

On December 8, 1998, the date set for a preliminary hearing in this matter, appellant pled no contest to one count of insurance fraud involving Cigna Insurance (Count 2) and the section 487(1) grand theft charge involving the SBA. In return for this plea, the remaining four counts against appellant and all six counts against appellant's wife were dismissed. As part of the plea agreement, appellant and his wife agreed to dismiss a civil suit they had brought against one or more of the insurance companies. No sentence was specified in the plea agreement.

Appellant moved four times in the trial court to withdraw his no contest plea, on the grounds that (1) his plea was not voluntary; (2) he received ineffective assistance of counsel at the time of the plea; (3) there was no factual basis for the plea; (4) the grand theft charge was barred by the statute of limitations; and (5) breach of the plea agreement by the prosecutor. These motions were all denied by the court. Appellant also filed two petitions for writ of mandate with this Court challenging the trial court's denial of his January 29 motion to withdraw on the ground of involuntariness and of his March 18 motion to withdraw on the basis of ineffective assistance and lack of a factual basis. Both petitions were summarily denied, on February 25 and April 19, 1999 respectively.

Discussion

1. Knowing and voluntary

Appellant contends that the trial court erred in denying his motion to withdraw his no contest plea because he unknowingly waived his right to litigate the factual question of whether the grand theft charge was time-barred and because he was not aware of a potentially meritorious defense.

Section 1018 provides that a court may, upon a showing of good cause, allow a defendant to withdraw a plea of guilty. The defendant must establish good cause by clear and convincing evidence. (*People* v. *Cruz* (1974) 12 Cal.3d 562, 566.) The grant or denial of the motion is within the court's discretion, and the court's decision will not be overturned unless there is a clear showing of an abuse of that discretion. (*People* v. *Fairbank* (1997) 16 Cal.4th 1223, 1254.)

Here, the trial court denied appellant's motion on the ground that the complaint contained an allegation, pursuant to *People* v. *Zamora*, *supra*, 18 Cal.3d 538, that appellant's false income tax filing was not discovered until about April 1998. We see no abuse of discretion in this decision.

a. Waiver

Appellant contends that his no contest plea was in effect a waiver of his right to litigate the issue of whether the statute of limitations was tolled and that such a waiver is valid only if it is

made knowingly. He contends that his waiver was not knowing.

In one sense, by his plea of no contest, appellant "waived" his right to litigate *all* factual issues in this case by waiving his right to a trial and all the rights attendant to that right.[3] However, it might be more accurate to say that by his plea of no contest, appellant admitted the truth of all factual allegations in the complaint, including the allegation that his false tax returns were not discovered until April 1998. Regardless of how it is characterized, we see no reason to treat the issue of tolling differently from any other factual issue.

Appellant has not cited and we are not aware of any authority holding that a defendant must make a knowing waiver of the right to litigate any specific factual issue, including the issue of tolling, before his plea can be valid. *People* v. *Williams* (1999) 21 Cal.4th 335, cited by appellant, does not so hold. That case involved a charge which was barred on the face of the complaint; there was no tolling allegation. The Supreme Court in *Williams* held: "We maintain the rule that if the charging document indicates on its

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[3] There can be no doubt that this waiver was knowing and intelligent. Appellant was advised that he had the right to a trial by jury or by the court on all charges, the right to confront witnesses against him and the right to present a defense, and further advised that by pleading no contest he was giving up those rights. Appellant indicated that he understood these rights and waived them.

face that the charge is untimely, absent an express waiver, a defendant convicted of that charge may raise the statute of limitations at any time." (*Id.* at 338.)

The Court in *Williams* made it clear that "[a]lthough . . . defendants may not forfeit the statute of limitations if it has expired as a matter of law, they may certainly lose the ability to litigate factual issues such as questions of tolling." (*Id.* at p. 344.) The Court pointed to *People* v. *Padfield* (1982) 136 Cal.App.3d 218 as an example of a situation in which such a loss occurs. In *Padfield*, the Court of Appeal held "that the statute of limitations is waived by [a no contest] plea when, as here, the accusatory pleading properly alleges that the statute has been tolled." (*Id.* at p. 221) The Court explained that this is so because when a complaint contains an adequate tolling allegation, "the issue of the statute of limitations is solely an evidentiary one." (*Id.* at p. 226.) Thus, when a defendant pleads no contest to such a complaint, he admits the sufficiency of the evidence establishing that the statute of limitations was tolled. (*Id.* at p. 227.) Nothing in *Padfield* or *Williams* suggest that before being allowed to plead no contest a defendant must be advised that the effect of the plea is to waive the statute of limitations.

b. Meritorious defense

Appellant contends that even if he could unknowingly waive the statute of limitations issue, his plea was still not knowing and intelligent because he was not aware of evidence

showing that the statute of limitations was a potentially meritorious defense.

Appellant relies on *People* v. *Harvey* (1984) 151 Cal.App.3d 660 to support his claim that a guilty plea is not intelligent or voluntary when defense counsel fails to advise the defendant of evidence vital to his defense. In *Harvey*, defense counsel failed to tell the defendant that a psychiatrist had formulated a professional opinion that defendant was mentally incapable of harboring malice, premeditating or deliberating at the time of the killing. In ignorance of these facts, the defendant pled guilty to second degree murder. (*Id.* at pp. 665-666.)

Here, appellant contends that his counsel failed to advise him of the existence of a telephone log of an SBA loan officer which appellant claims showed that the officer had concluded in 1993 that appellant had submitted a false income tax return.[4] However, appellant stated in a sworn declaration in the trial court that the supervisor of the SBA disaster assistance center helped him process his loan application and "knew that the income return which I filed [was] false." Thus, under appellant's version of events, he knew that the SBA was aware of his false tax returns in 1993. The telephone log, at most, was further evidence of the SBA's knowledge. The situation before us is therefore unlike the situation before the court in *Harvey*.

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[4] The telephone log is not before us on this appeal, and so we have no knowledge of its contents.

2. Ineffective assistance of counsel

Appellant contends that he received ineffective assistance of counsel at the time he entered his no contest plea because his attorney at the time failed to discover that the SBA knew of his false tax returns in 1993, and that the trial court erred in denying his motion to withdraw his no contest plea on that ground. We cannot agree.

Although it is the defendant who ultimately decides whether to enter into a plea bargain or proceed to trial, "it is the attorney, not the client, who is particularly qualified to make an informed evaluation of a proffered plea bargain. The defendant can be expected to rely on counsel's independent evaluation of the charges, applicable law, and evidence, and of the risks and probable outcome of trial. [Citations] [Para.] The pleading- and plea bargaining-stage of a criminal proceeding is a critical stage in the criminal process at which a defendant is entitled to the effective assistance of counsel guaranteed by the federal and California Constitution. [Citations.]" (*In re Alvernaz* (1992) 2 Cal.4th 924, 933.)

When the alleged ineffective assistance of counsel involves a guilty plea, the defendant must show that his counsel's advice was not "within the range of competence demanded of attorneys in criminal cases" and that "but for counsel's errors," the defendant would have proceeded to trial. (*Hill* v. *Lockhart* (1985) 474 U.S. 52, 56-59; see *In re Alvernaz*, *supra*, 2 Cal.4th at pp. 933-934.)

Appellant contends that his counsel was incompetent because he did not review the evidence well enough to notice that an SBA telephone log contained an entry showing that an SBA loan officer "had known" in 1993 that appellant had submitted a false tax return and to recognize this as providing appellant with a statue of limitations defense.[5] However, the telephone log is not before us, and so we cannot assess how clear it is from the face of the document that the SBA loan officer "knew" that the tax returns were false.

Thus, we are unable to assess whether counsel was deficient in failing to notice the entry. Since appellant has the burden of proving ineffective assistance of counsel, including counsel's deficient performance, his claim fails. (*People* v. *Pope* (1979) 23 Cal.3d 412, 425.)

Further, even assuming for the sake of argument that counsel's performance was deficient, appellant has not shown that he would have pleaded not guilty and insisted on going to trial if his attorney had told him that Count 6 could have been challenged on statute of limitations grounds. In his declaration in the trial

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[5] We note that appellant knew that the SBA knew his tax returns were false, yet failed to communicate this fact to his attorney. While appellant may not have understood the precise legal meaning of the *Zamora* allegation, the facts in that allegation are clear. By telling his attorney that he did not commit the crime rather than telling him that the SBA knew of the false returns and approved the loan anyway, appellant may well have misdirected his counsel's attention.

court, appellant states: "Had I known that Count Six would have been barred by the statute of limitations, I would not have pled guilty to that count." However, to the extent that any deficient performance occurred, it would have been in counsel's failure to inform appellant that the statute of limitations was a *possible* defense to the charge. As we explain, supra, the *Zamora* allegation makes the statute of limitations issue one of fact. There was no guarantee that appellant would have prevailed on that issue.[6] Appellant has offered no declaration that he would not have pled guilty if his attorney had told him that there was a possibility that the charge could be proved to be time-barred. Thus, appellant's claim also fails because he has not shown a reasonable probability that, but for counsel's alleged incompetence, he would have elected to plead not guilty and go to trial.

3. Breach of plea agreement

Appellant contends that the prosecutor breached an implied condition of the plea agreement by submitting a sentencing memorandum recommending a five-year prison sentence and discussing the facts of the dismissed charges. We cannot agree.

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[6] Further, the complaint alleges that the Count 6 theft consisted, at least in part, of failing to use the SBA loan proceeds for their specified purpose and failing to repay the loan. A reasonable trier of fact could find that notice of a false tax return at the time of a loan application would not put the lender on notice of a misuse of the loan proceeds.

Appellant acknowledges the plea agreement did not expressly include the condition that the prosecutor not submit a sentencing agreement. He contends that this condition must be implied from the prosecutor's statement to appellant that "your sentence will be determined at a later date by the judge before whom you are now entering this plea."

Assuming for the sake of argument that a plea bargain may contain an implied condition, we see nothing in the above statement which implies that the prosecutor will not attempt to influence the court's sentencing decision. The statement simply emphasizes the fact that no sentence has been agreed to as part of the plea bargain. We see no breach of the plea agreement in the prosecutor's recommendation of five years in state prison.

Relying on *People* v. *Harvey* (1979) 25 Cal.3d 754, appellant contends that it is an implied condition of every plea bargain that a defendant will not suffer any adverse sentencing consequences by use of facts related to any dismissed counts. (*Id.* at p. 758.) He contends that the prosecutor breached the plea agreement by arguing facts from dismissed counts to support the recommended five year prison sentence. We cannot agree.

The condition implied by the Court in *Harvey* is that there will be no adverse sentencing consequences. Here, the trial court was already familiar with the facts, and expressly stated that it was not considering the circumstances of the

dismissed counts in determining appellant's sentence. Thus, appellant did not suffer any adverse sentencing consequences from the facts of the dismissed counts. The mere fact that the prosecutor in this case discussed facts related to dismissed counts did not breach the implied condition found by the Court in *Harvey*.

4. Voluntariness

Appellant contends that his plea was not voluntary because he was pressured to plead in exchange for the prosecutor's promise to dismiss all charges against his wife. We cannot agree.

Appellant moved in the trial court to withdraw his plea on the ground that it was not voluntary. According to appellant, the pressure occurred immediately before the hearing in which he entered his plea. The trial court denied this motion. The court based this denial primarily on appellant's express statement during the taking of the plea that he was not under pressure, and also on the fact that he never indicated during the course of an apparently lengthy plea-taking process that he was under pressure. The court had the advantage of observing appellant's demeanor during the plea, and we give substantial deference to the court's finding that appellant was not under pressure during the taking of the plea, a process which occurred very shortly after the meeting in which appellant contends he was pressured.

The trial court also found, and we agree, that the statement which appellant identified as

coercive were simply factual statements of what could happen if appellant and his wife were convicted. There can be no doubt that the consequence which appellant now claims motivated his plea, the deportation of his wife if she were convicted, could indeed have occurred.

To the extent that appellant contends that the trial court erred in failing to conduct an inquiry into possible coercive forces because his plea was part of a "package deal," we cannot agree.

In *People* v. *Ibarra* (1983) 34 Cal.3d 277, our Supreme Court found that a trial court must conduct an inquiry into the voluntariness of a guilty plea which is part of a package deal. The package deal in *Ibarra* was that if all defendants pled guilty, they would all receive a lesser sentence. Defendant Ibarra claimed that he pled guilty because he was afraid that his codefendant would attack him if he did not. (*Id.* at p. 287.) While the plea bargain in this case is not identical to the one in *Ibarra*, it appears to have been a package deal within the meaning of *Ibarra* since the plea bargain in this case was contingent on the agreement of both defendant: appellant's wife would not be dismissed from the case unless appellant plead guilty to two offenses, and appellant would only be able to plead guilty if his wife agreed to drop the civil lawsuit brought by appellant his wife. Appellant claims that he pled guilty because he was afraid that his wife would be deported.

However, there is a significant difference between the defendant's plea in *Ibarra* and appellant's plea: appellant was asked, in open court, in several different ways, whether his plea was voluntary, and each time he responded in the affirmative. Ibarra was never asked this question by the trial court.

Further, the facts known to the trial court show that under the totality of the circumstances test set forth in *Ibarra*, appellant's plea was voluntary.[7] The only factor suggesting involuntariness was the fact that appellant's co-defendant was his wife. While this is not insubstantial, every other factor weighed in favor of voluntariness. There was nothing improper in the inducement offered by the prosecutor. The prosecutor had a reasonable and good faith case against appellant's wife, to whom lenience was promised. The complaint charged both appellant and his wife with the same crimes, and appellant does not dispute that his wife signed the allegedly fraudulent documents submitted to the insurance companies and the SBA. As we discuss, infra,

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[7] The Court in *Ibarra* instructed that the court must determine whether the inducement for the plea is proper, the prosecutor has misrepresented any facts to the defendant, the prosecutor has a reasonable and good faith case against the third parties to whom leniency is promised, there is a factual basis for the plea, the bargained-for plea is disproportionate to appellant's culpability, the party promised leniency is a close friend of family member, and the promised leniency was a significant factor in the defendant's decision to plead guilty. (*People* v. *Ibarra*, 34 Cal.3d at pp. 288-289.)

there was a factual basis for appellant's plea. No disproportionate sentence was involved in appellant's bargain. By appellant's own admission, the possibility that he faced a long prison term if convicted was significant factor in his decision to plead guilty.

We find that the factors supporting voluntariness outweigh the factor suggesting involuntariness and that appellant's plea was voluntary. To find otherwise would be to find that there are no circumstances in which a defendant can voluntarily plead guilty when a codefendant is a loved on who receives a favorable disposition as part of the overall plea bargain. As *Ibarra* makes clear, that is not the law.

5. Factual basis

Appellant contends that the record does not establish a factual basis for his plea. We see no prejudicial error.[8]

Section 1192.5 provides in pertinent part: "The court shall ... cause an inquiry to be made of the defendant to satisfy itself that the plea is freely and voluntarily made, and that there is a factual basis for the plea." (Section 1192.5) This duty to inquire applies only to negotiated, conditional pleas not to unconditional, open pleas.

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[8] Appellant's motion to withdraw his guilty plea on the ground that the plea lacked a sufficient factual basis was denied without comment by the trial court.

(*People* v. *Hoffard* (1995) 10 Cal.4th 1170, 1181-1182.)[9]

It is not necessary that the record contain evidence of each element of the charged offense, and it is not necessary for the court to believe that the defendant is guilty beyond a reasonable doubt. (*People* v. *Wilkerson* (1992) 6 Cal.App.4th 1571, 1578.) Section 1192.5 requires only that the trial court have sufficient evidence to determine that there is a prima facie case for the charges. (*Id.* at p. 1580.) A general stipulation by counsel to a factual basis, without more, is not sufficient to satisfy section 1192.5. (*People* v. *Mickens* (1995) 38 Cal.App.4th 1557, 1563-1565.)

Here, although appellant was not promised a specific sentence, his plea was negotiated and was conditional on the dismissal of other charges against him and on the dismissal of all charges against his wife. Thus, a factual inquiry was required.

The prosecutor asked appellant's counsel if he stipulated to a factual basis for the plea, and appellant's counsel replied that he did. The court then stated that it "adopts the findings as set forth [in] the record."

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[9] Section 1192.3, subdivision (a) also requires the existence of a factual basis for a plea entered on the condition additional charges will be dismissed, where restitution is involved. (*People* v. *Hoffard*, *supra*, 10 Cal.4th at p. 1182, fn. 10.)

Assuming for the sake of argument that this inquiry was not sufficient, we find that any error is harmless since "adequate information was before the [lower] court and is reflected in the record." (*People* v. *Wilkerson*, *supra*, 6 Cal.App.4th at p. 1572; see *People* v. *Mickens*, *supra*, 38 Cal.App.4th at p. 1565 [when trial counsel stipulates to a factual basis for a plea, but appellate counsel claims the plea lacks an adequate factual basis, an appellate court may review the record to determine it if meets the factual basis requirement].)

Appellant himself has repeatedly admitted that he submitted false tax returns to the SBA in order to obtain a loan. This is a more than adequate factual basis for Count 6.

It is also not disputed that appellant's shopping mall was destroyed by arson. The insurance fraud in Count 2 was related to that arson. There was a lengthy investigation of the arson, and the certificate of probable cause expressly incorporated the "official reports and documents of a law enforcement agency." The trial court held the defendants to answer on the basis of this evidence.

Although the reports and documents are not before us, the record shows that both those official reports and the reports of an insurance company investigator are sufficient to support a prima facie case on the arson-related insurance fraud. For example, at the March 18, 1999 motion to withdraw his guilty plea, appellant's counsel represented that an investigator for one of the

insurance companies had stated, under oath at a deposition in the related civil suit, that a container containing gasoline was found in one of the burned businesses. As the probation report clarifies, the gasoline was in a container labeled "pec sec," which was a substance used by a dry cleaning shop in the mall. Both businesses were run by the Songs. Appellant's counsel did not dispute that the facts as reported by the insurance company investigator were sufficient to support the arson charge against appellant. Appellant's counsel merely argued that the evidence was fabricated, and was contradicted by the reports of other investigators. It is possible that at trial, a jury might have agreed that the investigator fabricated evidence or was mistaken. However, the evidence to support a plea does not have to show a defendant guilty beyond a reasonable doubt. It merely has to make a prima facie case. Such a case existed here.

6. Restitution order

In his supplemental opening brief, appellant contends that the trial court erred in ordering direct restitution to Cigna Insurance. We disagree.

Relying on *People* v. *Birkett* (1999) 21 Cal.4th 226, appellant contends that direct restitution to insurance companies is not proper. Appellant's reliance is misplaced. The Court in *Birkett* found that insurance companies which reimburse crime victims for their losses, pursuant to the victim's insurance policies, do not become

direct victims of the crime for restitution purposes. (*Id.* at p. 229.) The Court noted that courts were not prevented "from ordering restitution to any corporation, . . . agency, . . . or commercial entity when that entity is a direct victim of a crime." (*Id.* at p. 231.) Here, it was not a policy holder who was defrauded, it was the insurance company itself. Cigna was the direct victim of appellant's fraud, that is, appellant made misrepresentations to Cigna which resulted in Cigna's loss. Accordingly, the trial court's restitution order was proper.

7. Penalty assessment

Respondent contends that the trial court erred in failing to impose penalty state and county assessments pursuant to section 1464 and Government Code section 76000 on the direct restitution ordered paid to the victim pursuant to section 1202.4, subdivision (f). We do not agree. As we have previously held, these two penalty assessments do not apply to direct restitution orders when, as here, the defendant is sentenced to prison. (*People* v. *Dorsey* (1999) 75 Cal.App.4th 729.)[10]

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[10] The trial court recommended that appellant serve his prison sentence in a restitution center. These centers are run by the Department of Corrections and are supported by the prisoner's wages and labor. Nothing about this disposition makes our analysis in *Dorsey* inapplicable in this case.

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ARMSTRONG, J.

We concur:

TURNER, P.J.

GODOY PEREZ, J.

APPENDIX B

Court of Appeal, Second Appellate District, Division Five - No. B133847

S091094

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

WON HO SONG, Defendant and Appellant.

Petition for review DENIED.

SUPREME COURT
FILED

OCT 25 2000
Frederick K. Ohlrich Clerk

DEPUTY

GEORGE

Chief Justice

APPENDIX C

Declaration of Won Ho Song

I, Won Ho Song, make the following statement under penalty of perjury:

I am the defendant in the Case BA170708 which is currently before this Court. I was charged with six counts of fraud along with my wife (Eun Ja Song) on July 7, 1998.

I sought out Angela Oh, a Korean attorney, for counsel. She decided to represent my wife and referred me to her close colleague Mr. Yamamoto. I then retained Mr. Yamamoto to represent me.

I told Mr. Yamamoto that I was not guilty of the charges against me. I tried to discuss the case with him in detail; however, he said it was not necessary to get all the details of the case at that time because he will get the details after the preliminary hearing. I never got to tell him the full story because I pled guilty before the preliminary hearing.

Mr. Yamamoto has not discussed any potential defenses with me; nor did he discuss his defense strategies for the alleged charges. For instance, Mr. Yamamoto never told me that the government could not charge me with Count Six because it would have been barred by the statute of limitations. Moreover, although Mr. Yamamoto knew that the arson charge did not have merit, he did not tell me that Counts Two through Five would fail if the arson charge were to fail. Also,

Mr. Yamamoto failed to investigate into a possible conflict of interest Ms. Angela Oh had in representing my wife. Ms. Angela Oh's husband helped process my SBA loan papers and knew that the income return which I filed were false. The reason why I went to Angela Oh in the first place was because her husband was involved in my SBA loan approval. I explained to Angela Oh that her husband knew about the false income tax return I submitted.

On the day of the preliminary hearing, Angela Oh came to me alone and took me and my wife to a small room and said that "the picture was good but now it turned bad." She then said that in Korean that the situation was very grave and dangerous and told me that I had to plead guilty to two of the six charges. While mixing Korean and English, Angela Oh without the presence of my attorney pressured me to plead guilty to Counts Two and Six. She said that if we go to trial and convicted, we could get 10 years or more in prison. She told me that I had to agree to the plea-bargain now in order to get probation.

After we were alone with Angela Oh for a while, Mr. Yamamoto came in and told me that the prosecutor wanted to make a deal. He told me to plead guilty to the two charges and told me that I would get probation. He also told me that I and my wife had to drop our civil lawsuits. In return, he told me that the charges against my wife would be dismissed. Both Mr. Yamamoto and Angela Oh said that if I did not enter a plea now, that my wife and I could get 10 years or more in prison if convicted of all the counts. They also

said that my wife could be deported after a conviction if I did not accept the deal.

At no time did Mr. Yamamoto explain to me what "open plea" was and that I would be making an "open plea." He did not even inform us about the possibility of going to jail if I pleaded guilty. I asked both attorneys that if a plea-bargain could be made at another time and they both told me that this was the last chance.

A Korean interpreter was then brought in by Mr. Yamamoto and I was pressured to make the decision within a few minutes. The interpreter had to leave and he told both attorneys that a new interpreter would come soon. However, both attorneys wanted me to make the decision before the interpreter left the room.

I strongly believe that Mr. Yamamoto did not investigate the case sufficiently and did not discuss the potential defenses with me. Had I known that Count Six would have been barred by the statute of limitations, I would not have pled guilty to that count. Had I known that Counts Two through Five were dependent on the arson charge, I would not have pled guilty to Count Two.

Executed: 3-16-99 **/s/ Won Ho Song**

Won Ho Song

APPENDIX D

Declaration of Michael F. Yamamoto

I, Michael F. Yamamoto, make the following statement under penalty of perjury:

1. I am an attorney at law, licensed to practice in all the courts of the State of California.

2. I was retained to represent defendant Won Ho Song in the case that is before this Court, Case No. BA170708. I represented Mr. Song on December 8, 1998 at the change of plea hearing, at which time Mr. Song entered guilty pleas to one count of insurance fraud (Count Two) and one count of grand theft (Count Six).

3. Prior to Mr. Song entering the guilty pleas, I had not known that the SBA loan agent had known in 1993 that the income tax return submitted by Mr. Song was false. Therefore, I did not inform Mr. Song that Count Six could be challenged on the ground that the statute of limitations would bar the charging of that count.

4. I knew Jack Koulbanis was attorney Angela Oh's husband. Although I saw Jack Koulbanis' name on some of the SBA documents, I did not ask Mr. Song what his involvement was. I did not investigate whether attorney Angela Oh would have any conflict of interest in representing Mrs. Song in light of the fact that her husband's name appeared in Mr. Song's SBA loan papers.

5. After reviewing the case, I concluded that the arson charge did not have merit and

believed that we would eventually prevail on that count.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: 3-17-99

/s/ Michael F. Yamamoto

Michael F. Yamamoto